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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

INTEL CORPORATION,

Plaintiff,

v.

INSURANCE COMPANY OF THE STATE OF
PENNSYLVANIA and DOES 1 through 100,

Defendants.

Case Number C 08-3238 JF (PVT)

ORDER¹ (1) GRANTING MOTION FOR
CONTINUANCE IN PART; (2)
GRANTING IN PART MOTION TO
INTERVENE; AND (3) DEFERRING
DETERMINATION OF MOTION FOR
PARTIAL SUMMARY JUDGMENT

[re: doc. nos. 24, 25, 44, 49, 85]

Plaintiff Intel Corporation (“Intel”) moves for partial summary judgment that Defendant Insurance Company of the State of Pennsylvania (“ICSOP”) breached its duty to defend Intel in two state court class actions. After Intel filed its motion, ICSOP requested a continuance pursuant to Fed. R. Civ. P. 56(f) on the ground that additional discovery is required to ascertain the costs Intel incurred in the state court actions. In addition, a second insurer of Intel, Markel American Insurance Company (“Markel”), has filed a motion to intervene, seeking declaratory relief because it believes that Intel will file a future suit against it based upon the same claims now being asserted by Intel against ICSOP. Markel also requests that the Court defer

¹ This disposition is not designated for publication in the official reports.

1 determination of Intel's motion for partial summary judgment to permit Markel to file a full
2 opposition. For the reasons set forth below, ICSOP's motion for a continuance will be granted
3 and Markel's motion to intervene will be granted in part. Substantive consideration of Intel's
4 motion for partial summary judgment will be deferred in order to provide both ICSOP and
5 Markel additional time to oppose the motion.

6 I. BACKGROUND

7 In the underlying state court actions against Intel, the class plaintiffs alleged that Intel
8 engaged in false and misleading advertising with respect to the performance of its Pentium 4
9 processors. The first action, entitled *Barbara's Sales, Inc., et al. v. Intel Corp., et al.*, No. 02-L-
10 788 (the "*Barbara's Sales Action*") was filed in Madison County, Illinois in June 2002. The
11 third amended complaint in the *Barbara's Sales Action* alleged various claims for relief,
12 including unfair competition, and *inter alia* sought recovery under the California Consumers
13 Legal Remedies Act, Cal. Civil Code § 1750 *et seq.* ("CLRA"); the California Unfair Business
14 Practices Act, Cal Bus. & Prof. Code § 17200 *et seq.* ("UCL"); and the Illinois Consumer Fraud
15 and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.* On November 29, 2007, the
16 Illinois Supreme Court held that Illinois law applied to the claims at issue and that class
17 certification was improper because the generalized allegations set forth by the plaintiffs
18 amounted to "mere puffery" that was not actionable under applicable Illinois law. *Barbara's*
19 *Sales v. Intel*, 227 Ill. 2d 45, 74 (2007). On March 20, 2008, the *Barbara's Sales Action* was
20 dismissed with prejudice.

21 The second action, entitled *Janet Skold, et al. v. Intel Corp.*, No. RG 04145635 (the
22 "*Skold Action*"), was filed in the Alameda Superior Court in March 2004. The allegations in the
23 *Skold Action* are similar to those in the *Barbara's Sales Action*. In August 2006, a specific
24 damages claim was added to the *Skold* complaint, seeking recovery for violations of the CLRA,
25 UCL, and the California False Advertising Act (Cal. Bus. & Prof. Code § 17500). The *Skold*
26 action still is ongoing.

27 In 2006, Intel sued XL Insurance America, Inc. ("XL"), the issuer of Intel's primary
28 litigation insurance policy (referred to herein as the "XL 00-01 Policy"), in the Santa Clara

1 Superior Court, alleging that XL breached its duty to defend Intel in the *Barbara's Sales* and
 2 *Skold* Actions. The crux of the dispute between Intel and XL was the following provision in the
 3 XL 00-01 Policy, which applies to liabilities for claims related to "Advertising Liability." This
 4 provision defines Advertising Liability as including:

5 Injury arising out of offenses such as, but not limited to, libel, slander,
 6 defamation, infringement of copyright, title (including trademark) or
 7 slogan, piracy, unfair competition, idea misappropriation, (including
 8 trade secrets), breach of confidential information, electronic mail
 9 intercepts, misappropriation of the style of doing business (including
 10 website/homepage design), or invasion of rights of privacy committed,
 11 or alleged to have been committed, in any software, advertisement,
 12 promotion, publicity article, broadcast, or telecast.

13 Labrador Decl., Ex. B at § I.E. The XL 00-01 Policy also contains various exclusions. One of
 14 the exclusions applies to claims for advertising liability, as set forth below:

15 This policy shall not apply:

16 ***

17 (C) Under Advertising Liability for:

- 18 (1) Breach of written contract;
- 19 (2) Incorrect description of any article or commodity; or
- 20 (3) Mistake in advertised price.

21 *Id.* at § VII.C(1)-(3). After Intel and XL filed cross motions for summary judgment, the Alameda
 22 Superior Court held that XL had failed to establish that Intel had no potentially covered liability
 23 under the XL 00-01 Policy. Subsequently, the parties settled for an amount equal to the full
 24 coverage limits of the XL 00-01 Policy.

25 ICSOP is the issuer of one of Intel's excess insurance policies, entitled Follow Form
 26 Excess Liability Policy No. 4798-2252 (the "ICSOP Policy"). The ICSOP Policy requires
 27 ICSOP to defend Intel with respect to litigation costs in excess of the amount provided for in the
 28 XL 00-01 Policy. As the ICSOP Policy is a "follow form" policy, it contains the same rights and
 duties contained in the XL 00-01 Policy. Intel first notified ICSOP of the *Barbara's Sales* and
Skold Actions in April 2004, but it did not notify ICSOP that its defense costs had accumulated
 to the attachment point of the ICSOP policy until December 2007.

Markel is the issuer of another excess insurance policy for Intel (the "Markel Policy"),

1 which requires Markel to defend once costs exceed a threshold above that provided for by the
 2 ICSOP Policy. Markel alleges that in November 2007, Intel tendered the *Barbara's Sales* and
 3 *Skold* Actions for coverage and requested that Markel sign a confidentiality agreement. Markel
 4 asserts that Intel has breached its duty to cooperate with Markel's investigation as to whether it
 5 has a duty to defend Intel.

6 II. DISCUSSION

7 A. Deferral of Motion for Partial Summary Judgment

8 Summary judgment should be granted only when there are no genuine issues of material
 9 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);
 10 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Intel argues that the Court should
 11 rule on its motion for partial summary judgment now because Intel merely seeks a ruling as to
 12 whether ICSOP breached its duty to defend. In response, ICSOP contends not only that the
 13 language of the policy exclusion bars Intel's request for reimbursement of defense costs but also
 14 that ICSOP requires additional time to investigate whether the attachment point of the ICSOP
 15 policy in fact has been reached. Specifically, ICSOP alleges by affidavit that it has not been able
 16 to determine whether Intel exhausted certain additional primary insurance policies held by Intel.
 17 Absent such horizontal exhaustion, ICSOP would not have a duty to defend. *See Cmty.*
 18 *Redevelopment Agency v. Aetna Cas. & Surety Co.*, 50 Cal. App. 4th 329, 339 (1996) ("It is
 19 settled under California law that an excess or secondary policy does not cover a loss, nor does
 20 any duty to defend the insured arise, until all of the primary insurance has been exhausted.").
 21 ICSOP also asserts that Intel's prior settlement with XL included funds allocated to costs
 22 associated with litigation other than the *Barbara's Sales* and *Skold* Actions, casting further doubt
 23 upon whether the attachment point of the ICSOP Policy has been reached. Finally, ICSOP seeks
 24 additional time to analyze expense forms that already have been produced by Intel. The Court
 25 concludes that the proper resolution of Intel's motion would be aided by providing ICSOP with
 26 additional time to investigate the aforementioned issues. *See State of Cal v. Campbell*, 138 F.3d
 27 772, 779 (9th Cir. 1998) ("a district court should continue a summary judgment motion upon a
 28 good faith showing by affidavit that the continuance is needed to obtain facts essential to

preclude summary judgment.”). At oral argument, counsel for ICSOP represented that a period of ninety days would be sufficient to evaluate Intel’s defense costs and the applicability of additional insurance policies held by Intel. Accordingly, ICSOP will be granted ninety days from the date of this order to conduct further discovery.

B. Intervention by Markel

In the Ninth Circuit, there are four requirements for intervention as of right under Fed. R. Civ. P. 24(a)(2): (1) the application for intervention must be timely; (2) the applicant must have a “significantly protectable” interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that disposition of the action may, as a practical matter, impair or impede the applicant’s ability to protect that interest; and (4) the applicant’s interest must be inadequately represented by the existing parties in the lawsuit. *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 836 (9th Cir. 1996). Alternatively, a court may grant permissive intervention under Rule 24(b) if there is an independent ground for jurisdiction, the motion to intervene is timely, and a common question of law or fact exists. *Southern Calif. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002). Even if the threshold requirements for permissive intervention are met, a court has discretion to deny permissive intervention. *Id.*

Intel argues that Markel has not satisfied the requirements for either permissive intervention or intervention as of right because there is no realistic chance that the higher coverage levels provided by the Markel Policy will be reached. In other words, Intel’s position is that Markel’s claims are not ripe and that accordingly the Court lacks jurisdiction to consider Markel’s request for declaratory relief. Intel also argues that intervention as of right is unavailable because Markel’s desire to avoid an unfavorable ruling with respect to the meaning of the policy provisions at issue is not a protectable interest within the meaning of Rule 24(a). Intel contends that because different facts underlie the various defenses asserted by the two insurers, permissive intervention will impair the efficient resolution of the dispute between Intel and ICSOP.

In response, Markel asserts that the total damages sought by the plaintiffs in the *Skold* Action, if proven, will reach the Markel Policy. Markel also alleges that a duty to cooperate

1 arose once Intel tendered the *Skold* Action to Markel, and that Intel has breached that duty by not
2 cooperating with Markel's investigation to determine whether coverage in fact is appropriate.
3 Finally, Markel disputes whether the factual differences underlying each of the insurers'
4 respective defenses as to Intel's duty to cooperate are sufficiently significant that they would
5 impede judicial economy.

6 In an action for declaratory relief, a district court may exercise jurisdiction only over a
7 case or controversy that is ripe for review. *See Am. States Ins. Co. v. Kearns*, 15 F.3d 142, 143
8 (9th Cir. 1994). The Ninth Circuit has held that a district court may exercise jurisdiction over a
9 declaratory relief action filed by an insurer with respect to its duty to defend still-pending state
10 court litigation. *Id.* at 144. Thus, while the actual costs incurred by Intel may not have reached
11 an amount sufficient to trigger the Markel Policy, this fact by itself does not prevent the Court
12 from exercising jurisdiction. *See id.* *See also Employers Ins. of Wausau v. Fox Entm't Group,*
13 *Inc.*, 522 F.3d 271, 278 (2d Cir. 2008) ("That the liability may be contingent does not necessarily
14 defeat jurisdiction of a declaratory judgment action."). Moreover, the fact that Intel has tendered
15 the *Barbara's Sales* and *Skold* Actions to Markel for coverage is inconsistent with Intel's
16 position that no case or controversy exists between Markel and Intel. Nonetheless, the Court
17 agrees with Intel that Markel has not made an adequate showing to support intervention as of
18 right, and that Markel's desire to avoid unfavorable precedent with respect to the construction of
19 the policy provisions at issue is not a protectable interest under Rule 24(a)(2). *See In re Estate of*
20 *Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 986-87 (9th Cir. 2008).

21 Instead, the Court concludes that permissive intervention is appropriate but should be
22 limited in scope. "The district court's discretion, at least under Rule 24(b), to grant or deny an
23 application for permissive intervention includes discretion to limit intervention to particular
24 issues." *Van Hoomissen v. Xerox Corp.*, 497 F.2d 180, 181 (9th Cir. 1974). Here, the proper
25 interpretation of the Advertising Liability provision and the various exclusions within the
26 insurance policies is an issue common to all of the disputes among the parties. In contrast,
27 whether Intel has breached its duty to cooperate with Markel presents a separate question. The
28 resolution of that question would require additional time and discovery. Accordingly, Markel

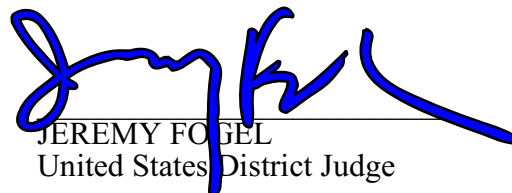
will be permitted to intervene for the limited purpose of opposing Intel's motion for partial summary adjudication that the policy provisions at issue impose a duty to defend the *Barbara's Sales* and *Skold* Actions. Such intervention will not create any additional delay in light of the Court's decision to defer resolution of Intel's motion.²

IV. ORDER

Good cause therefor appearing, IT IS HEREBY ORDERED that ICSOP's motion for a continuance is GRANTED, and Markel's motion to intervene is GRANTED IN PART.³ ICSOP shall have ninety (90) days from the date of this order to conduct additional discovery. The resolution of Intel's motion for partial summary judgment is deferred pending such discovery. Any dispute over the nature or scope of discovery shall be referred to Magistrate Judge Trumbull. Once the record has been developed sufficiently, the parties may file additional briefs and reserve a hearing date for oral argument.

IT IS SO ORDERED.

DATED: January 9, 2009



JEREMY FOGEL
United States District Judge

² Because intervention likely would result in issue preclusion between Markel and Intel as to this particular issue, Markel may withdraw its motion to intervene and instead file an *amicus* brief if it believes that it would be more prudent for it to present all of its claims and defenses together or if it requires additional discovery to oppose Intel's motion for summary judgment. Either of the two latter approaches should be pursued in a separate action against Intel.

³ Markel also filed a separate motion for a continuance and for joinder in ICSOP's opposition to Intel's motion for partial summary judgment. This motion is denied as moot in light of the instant order.

1 This Order has been served upon the following persons:

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